SOME PROBLEMS IN SPECIFIC PERFORMANCE[1]

I. Is there a Positive Rule of Mutuality?

WHERE a buyer asks specific performance of a contract to sell land or unique chattels it is usually quite easy to see that damages are not an adequate remedy. But suppose it is the seller who asks for specific performance — *i. e.*, asks that the buyer be compelled to pay the full purchase price and take the property — cannot the buyer properly insist that damages at law will be adequate? May he not plausibly argue that although there is no exact duplicate of the property there are other persons to whom the vendor may sell? The answer to this is that in perhaps the large majority of cases damages would not be adequate because there being no open market for such property it may be very difficult for the vendor to find other buyers.[2] But this question is seldom considered;[3] it is a hard and fast rule that if the property is such that the court would have given specific performance to the buyer if he had sued for it, the seller may have specific performance.[4] This is usually referred to as the doctrine of mutuality,[5] but it is to be noted that it is mutuality as a basis for *giving* relief and must be carefully distinguished from the doctrine of lack of mutuality as a ground for *denying* relief.

The two rules are sometimes so stated as to be destructive of each other; *e. g.*, it is sometimes said that "if one party to a contract

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[1] The substance of this article will appear in a forthcoming book on Equity.

[2] In reply to this it might be suggested that the vendor of land might sell it at public auction and collect the deficiency from the purchaser; but it might well happen that the buyer could raise the money to take the land and yet not be able to meet a judgment for damages for the deficiency.

[3] In a few states the vendor of land must show that damages would be inadequate. Porter *v.* Frenchman's Bay & Mt. Desert Land & Water Co., 84 Me. 195 (1892); 36 Cyc. 566, note 53.

[4] Adams *v.* Messinger, 147 Mass. 185 (1888); Adderley *v.* Dixon, 1 Simons & Stuart 607 (1824); Cheale *v.* Kenward, 3 De Gex & J. 27 (1858).

[5] Kenney *v.* Wexham, 6 Maddock, 355 (1822): "I consider this case, therefore, strictly a case of mutual remedy so as to entitle the vendor to a bill for specific performance."

may have specific performance, the other may." While it is still more common to find statements that "if for any reason one party to a contract cannot obtain specific performance the other party cannot." Somewhat like the famous cats of Kilkenny it is obvious that each rule, as thus stated, is capable of eating the other up. The solution to this enigma is that the two rules have each a separate place and function. The affirmative rule, apparently, has been invoked successfully only in favor of vendors or lessors against vendees or lessees and in only two classes of cases. If the subject-matter of the contract is such that damages would be inadequate to the purchaser, so that he could ordinarily have obtained specific performance if he had sued for it, the vendor may have specific performance; that is, if the buyer's or lessee's common-law remedy would have been inadequate, the court will not inquire into the adequacy of the seller's or lessor's common-law remedy. The other application of the rule is to the doctrine of part-performance as taking a case out of the operation of the Statute of Frauds; if a purchaser is held to have made a sufficient part-performance by the taking of possession so that he would have escaped the bar of the statute if he had sued for specific performance, the vendor may likewise take advantage of such part-performance. On the other hand apparently no one has attempted to apply the lack of mutuality rule to these two classes of cases; so that there has never been any conflict in the application of the two rules.

On principle the doctrine of mutuality is difficult to justify.[6] It seems to be an illustration of the tendency of equity courts to limit the scope of discretion and to widen the field of fixed rule.[7] Historically it is perhaps traceable to a notion on the part of the courts that in thus giving the vendor specific performance they were following out the principle that equality is equity;[8] it seems, however, a misapplication of the maxim, because that maxim properly applies only to members of a class, such as creditors, children, etc. It cannot reasonably be contended that the vendor and purchaser are members of a class.

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[6] It is sometimes suggested that the vendor of land is entitled to specific performance because of the doctrine of "equitable conversion." But this is putting the cart before the horse — a mistaking of cause for effect. Pooley *v.* Budd, 14 Beav. 34, 44 (1851).

[7] See "The Decadence of Equity," by ROSCOE POUND, 5 COL. LAW REV. 20.

[8] Lewis *v.* Lechmere, 10 Modern, 503 (1721).

It has been argued by Professor Ames that the vendor's right to get specific performance without inquiring into the adequacy of his common-law remedy "has nothing to do with any question of mutuality. The vendor, from the time of the bargain, holds the legal title as security for the payment of the purchase money and his bill is like a mortgagee's bill for payment and foreclosure of the equity of redemption." [9] It is not clear whether this refers to the vendor's *right* to hold as security or to his *obligation* so to hold. If it is the former that is meant, then it may be answered that in case of contracts to sell ordinary chattels without provision for credit, it is equally true that the vendor cannot be compelled to part with the title or possession of the goods till he has been paid; but this does not mean that he can recover the price in equity.[10] But if the argument refers to the vendor's *obligation* to hold the property it amounts substantially to the following argument by Professor Cook:[11]

"The seller's action for specific performance is really in the nature of an action to foreclose the equitable right of the buyer to specific performance. In other words, whether the seller asks for specific performance or seeks to foreclose the equity by a sale, the object of the suit is the same, to put an end to the situation created by equity in making the seller a trustee [12] for the buyer and permitting this relation to continue even after the time set for performance in the contract itself."

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[9] JAMES BARR AMES, "Mutuality in Specific Performance," 3 COL. LAW REV. 1, 12.

[10] In some jurisdictions he may, under some circumstances, recover the price at law. WILLISTON ON SALES, § 562.

[11] Prof. WALTER WHEELER COOK in 6 AMERICAN LAW AND PROCEDURE, 183, arguing that the doctrine of mutuality is unnecessary.

[12] Where a vendor has been fully paid the purchase price, he ceases to have any beneficial interest in the land and is substantially in the position of a trustee, but in such a case he does not stand in need of any remedy against the purchaser. If he has not been fully paid, it is inaccurate to refer to him as a trustee because he has an interest in the land which he may properly transfer by conveying to anyone but a *bonâ fide* purchaser for value without notice, while the trustee is under an obligation not to transfer the property to anyone, even though he may have loaned money to the *cestui que trust* upon the security of the trust property. And it is not accurate to call him a constructive trustee, because his obligation to hold the property for the purchaser and then to convey to him is consensual, not constructive. Because of his obligation not to convey to a *bonâ fide* purchaser, he may properly be called a fiduciary.

There seem to be three defects in this argument. If for some reason [13] the purchaser could not enforce specific performance against the vendor the latter is not a "trustee" or fiduciary and therefore there is no "situation" to put an end to, and yet the vendor may get specific performance. Secondly, in any case, if all that the vendor wishes is to get rid of his fiduciary obligation with reference to the land, it would seem that he can do that just as effectually by getting a common-law judgment for damages, as he can by obtaining a decree for specific performance, because such a judgment would apparently merge the cause of action not only of the vendor but also of the purchaser. After the vendor acquires a valid judgment at law for breach it is difficult to see how the purchaser could win a suit for specific performance. Furthermore, there seems to be some confusion as to causation. The argument seems to assume that the vendor's right to have the property sold in order to satisfy his claim is dependent upon the purchaser having the right to specific performance; but if for some reason the vendor could not enforce specific performance against the purchaser, but the purchaser could enforce against the vendor, could it be seriously contended that the vendor could foreclose the purchaser's equity by such a sale? The truth about the situation is that the right of the vendor to have the land sold to satisfy his claim is dependent not upon the purchaser's right to specific performance but upon the vendor's right to specific performance; in fact, it is a substitute given by equity in cases where specific performance is defeated by the inability of the purchaser to complete the contract. This is made even clearer by the further fact that if for some reason the purchaser cannot, but the vendor can enforce specific performance, the vendor may have the property sold to satisfy his claim, though there is of course no equity to foreclose. Of course the mere fact that the vendor's remedy of specific performance is somewhat similar to a mortagee's bill for foreclosure is no reason in itself why the vendor should be given such a remedy. The vendor's right to specific performance is a cause and not a result of the analogy [14]

[13] For example, if the purchaser has been guilty of fraud on the vendor, or if only the purchaser signed the memorandum required by the Statute of Frauds.

[14] Though this analogy is closer than the trust analogy because the mortgagee has a beneficial interest which he may freely transfer, it is not perfect. One important difference is that while a mortgage can be foreclosed only by judicial proceedings, the vendor may foreclose the equitable right of a defaulting purchaser outside of

between the relation of mortgagee and mortgagor and that of vendor and purchaser.

Professor Ames' argument continues:

> "This view is confirmed if we consider the position of a vendor who has conveyed before the time fixed for payment. He is now a creditor, just as if he had sold goods on credit, and there is no more reason why he should have a bill in equity than any other common-law creditor. No case has been found in which a bill has been sustained under such circumstances. The case of *Jones* v. *Newhall* [15] is a solid decision against such a bill."

It would seem that the fact just mentioned does not tend to show that there is no positive rule of mutuality, but merely that the rule is not applied where the vendor can get a judgment for the purchase money at law, because the procedure peculiar to equity is here unnecessary. When the purchaser of land sues for specific performance he must do so in equity because he wants a decree *in personam* that the vendor convey — something he cannot get at law. If the vendor sues without having conveyed, the suit must be in equity, because, *inter alia*, the common law does not regard the unaccepted tender of a deed of land as entitling the vendor to the purchase price; and a decree in equity is necessary to protect both parties by making the performance of each conditional upon the simultaneous performance by the other. No such conditional decree is necessary if the vendor has conveyed, and the remedy at law is quite adequate.

It would seem, therefore, that although it is difficult to justify the positive rule of mutuality, it is still more difficult to explain away its existence.

II. Financial Condition of a Defendant Vendor as a Basis for Specific Performance

Where specific relief has been sought against the commission of a tort the financial irresponsibility of the defendant has frequently been made the basis of equity jurisdiction.[16] It is obvious that the enjoining of a tort does not infringe upon the rights of the

court by giving him notice of his intention to rescind the contract unless the purchaser completes within a reasonable time.

[15] 115 Mass. 244 (1874).

[16] Nichols *v.* Jones, 19 Fed. 855 (1884), injunction against trespass.

defendant's creditors, because even if the threatened tort would result in a benefit to the defendant's estate, the creditors could not plausibly argue that they should profit from it.

Where one who has made a contract to sell ordinary chattels, and a large part or all of the purchase price has been paid, it is clear that damages are an inadequate remedy to the purchaser in any case where the vendor's financial condition is such that a judgment at law [17] cannot be collected in full; and if the rights of other creditors are not infringed it would seem that the purchaser ought usually [18] to be entitled to have the chattel transferred to him or to have declared thereon an equitable lien for the amount paid. Other creditors may properly object if decreeing such specific performance would result in giving to the purchaser property which should be distributed ratably among all the creditors. Whether this result would be accomplished in any particular case would seem to depend upon whether the defendant's financial irresponsibility consisted in his being: (1) execution-proof but not insolvent, (2) insolvent but not execution-proof, (3) both execution-proof and insolvent.

1. Suppose that the defendant has agreed to sell some cattle to the plaintiff who has paid the purchase price of $800; suppose further that by statute the defendant is entitled to an exemption of $3,000 worth of property and has altogether only $2,000 worth of property with total liabilities of $1,500, in which case he would obviously be execution-proof but not insolvent.[19] In such a case there would seem to be no valid objection on the part of other creditors to giving specific performance to the plaintiff because they are unable to enforce payment whether the purchaser does or does not get the equitable relief; if they can object validly, it would be only if there were reasonable grounds for supposing that the defendant's assets would later be so increased that he would no longer be execution-proof and that their chances of future

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[17] The appropriate remedy at law would be either an action for breach of contract in not delivering the chattel or an action in *quasi*-contract to recover back the amount of money paid.

[18] In one instance the defendant himself may probably raise a valid objection on the ground that specific performance would subject him to proceedings in involuntary bankruptcy.

[19] In determining solvency under the Bankruptcy Act, the test is whether the debtor's assets — both exempt and not exempt — are sufficient to pay his debts.

recovery were thus being infringed. Since the defendant is solvent, giving specific performance to the purchaser would not amount to ordering a preference and therefore the defendant cannot validly object on that ground. But it might be urged that giving specific performance against one who is execution-proof would violate the spirit though not the letter of the exemption statutes. The answer to this is that since the exemption statute does not prevent a debtor from selling, mortgaging or giving away exempt property, he cannot be heard to object if equity compels him to perform a contract to sell specific chattels.

2. If the defendant has property worth $10,000 and owes a larger amount, say $15,000, he is insolvent; but he is not execution-proof if the statutory exemption is $3,000. In such a case the other creditors may properly object to the purchaser getting specific performance because it would reduce the *pro rata* payment [20] which they would otherwise get, and they should be allowed to voice their objections by intervening in the specific performance suit. While the present Federal Bankruptcy Act is in force, the defendant himself may properly be allowed to object on the ground that such a decree is an order to compel him to commit a preference [21] and thus subject him to being thrown involuntarily into bankruptcy.

3. Assuming the same exemption statute, if the defendant has property worth $2,800 and owes debts amounting to $4,000 he is both execution-proof and insolvent. In such a case no creditor is able to enforce payment and it is doubtful whether the creditors should be allowed to object to the purchaser getting specific performance; if they can do so, the objection must be based upon the ground that although they are unable to enforce payment now, they might be able to do so later, and that giving specific performance would tend to decrease their chances of future recovery. It is doubtful whether the defendant himself could properly object since the chances of his being thrown into involuntary bankruptcy are extremely small, because there are no assets that are non-exempt.

The distinctions above suggested between a defendant being execution-proof, being insolvent, and being both execution-proof and insolvent seem to have been overlooked entirely. Apparently

[20] Under the influence of the equitable maxim that equality is equity, it is the spirit of modern bankruptcy and insolvency laws that creditors should share equally.

[21] WILLISTON ON SALES, § 144.

the only case on the subject using the phrase "execution-proof" is *Hendry* v. *Whidden*,[22] and in that case relief was denied. The failure of the courts to grasp the distinctions is probably the reason for the uncertainty of the law on the subject. There are many dicta and a few decisions in favor of giving the purchaser relief upon the ground of the defendant's financial irresponsibility, but they have been vigorously assailed.[23] It is believed that the distinctions suggested above offer the true solution of the problem which is briefly as follows: If the defendant is insolvent but not execution-proof, either the defendant or his creditors can validly object to the purchaser getting specific performance; if the defendant is execution-proof, whether insolvent or not, neither the defendant nor his creditors can validly object.

III. May the Heir get Specific Performance of Contracts to Build?

Where the defendant, having land in the vicinity of land owned by the plaintiff, has contracted with the plaintiff to erect a building on his own land, equity will usually grant specific performance.[24] The inadequacy of the common-law remedy is apparent; the amount of damage suffered by the plaintiff is difficult to estimate because the loss is that suffered by not obtaining the increase in value to the plaintiff's property in the neighborhood;[25] furthermore, it is of course impossible for the plaintiff to have anyone else erect the building because it would be a trespass to go on the defendant's land without his consent; and even if the defendant should consent to the erection of the buildings by the plaintiff, the plaintiff could not ordinarily afford to do so unless the consent also amounts to an agreement to pay therefor, because the building would become the property of the defendant. Still further, since what the plaintiff wants is the general result of increase in the value of his own land, much less supervision is required of the court than when the building is for the plaintiff's own use. In

[22] 48 Fla. 268 (1904).

[23] Williston on Sales, §§ 143 and 144; 18 Harv. L. Rev. 454; 1 Col. Law Rev. 267.

[24] Mayor of Wolverhampton *v.* Emmons, [1901] 1 K. B. 515.

[25] If the plaintiff had no property in the vicinity to be benefited, may he get specific performance? In the somewhat analogous case of VanSant *v.* Rose, 170 Ill. App. 572 (1912); 260 Ill. 401, a plaintiff who had sold property to the defendant with a restriction on its use was allowed to enforce the restriction though he no longer owned any land in the vicinity. But that decision is difficult to justify.

case the plaintiff were to die before the erection of the building it seems probable, at least, that the right to specific performance would descend to his heir and not go to his executor, because the result of specific performance would benefit the heir's land. And if the plaintiff by deed or will were to convey the property, which would be benefited by the erection, to different persons, it would seem that any one of them should be entitled to enforce specific performance, the right being analogous to the right to enforce an equitable servitude.[26]

Where the defendant has agreed to erect a building on the plaintiff's land, damages at law are usually adequate; in fact, the remedy at law may be even more satisfactory than specific performance[27] because the plaintiff can usually find someone else who will do the work substantially as well, and it is more agreeable to have a builder who works willingly than one who works under compulsion.[28] Hence the recent decisions refuse specific performance; but the early English case of *Holt* v. *Holt*[29] held that if the owner dies before the house is built, "the heir may compel the builder to build it and the father's executor to pay for it." It is at least likely that at that time[30] the father himself could have obtained specific performance, so that the court did not place the builder in a different position from that which he occupied before the father's death. Assuming that the father could have had specific performance, it is obvious that such a right would not pass to his executor but to his heir, because the performance of the contract would result in a benefit to the land which would, of course, pass to the heir. The giving of the remedy of specific performance to the ancestor by equity, therefore, created in the ancestor an equitable real property right to have a house built upon the land out of materials furnished by the builder; and this

[26] There seem to be no cases.

[27] Flint *v.* Brandon, 8 Ves. 159 (1803).

[28] It may happen, however, that it is impossible or very difficult for the plaintiff to get another builder; in such a case, if the hardship on the plaintiff would be very great, specific performance should be decreed.

[29] 1 EQ. ABRIDGMENT, 274, *placitum*, 11 (1694).

[30] In early times Chancery was quite liberal in granting specific performance of contracts to build on the plaintiff's land; the buildings involved were probably much simpler than those required by the average modern contract, and the task of supervision was therefore not so great. See 10 COL. LAW. REV. 574; 1 AMES EQ. CAS. 68, note 4. If the ancestor could not have obtained specific performance, it is difficult indeed to see any possible ground for the heir to get it.

equitable real property right passed to the heir along with other real property rights. It is to be observed that this right is the converse of a profit in gross in fee; the latter is an inheritable right to get a benefit *from* land but not appurtenant to other land; the former is a right to have a benefit *added to* land by the labor and materials of a builder, but not in any way connected with the builder's land.

Now that such contracts are not usually specifically enforcible against the builder by the ancestor for the reasons already given, it would seem clear that the accident of the ancestor's death should not take away the builder's defense. But has the change in the rule entirely wiped out the equitable property right of the ancestor and heir, or does it still exist but with other means of enforcement? It is at least arguable that the change by the equity courts in the way in which they exercise their discretion ought not to have the effect of destroying an equitable property right even though the right does, of course, owe its existence to the fact that at an earlier date courts of equity did give specific performance in such cases. At any rate, there are two fairly modern cases which are difficult to explain except on this assumption. In *Cooper* v. *Jarman* [31] the administrator had paid the builder for the finishing of the house after the intestate's death and it was held to be a proper payment. The chief argument of the court was, that to hold otherwise would place the administrator in an embarrassing position.

"The administrator could not safely pay the amount of damages claimed by the contractor for the loss sustained by the breach of contract. If he did, the next of kin might successfully say that he paid more than a jury would have allowed; and if he resisted and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit should exceed the amount to be paid for the completion of the contract, could the legal representative be allowed to deduct this from his accounts?"

And in *Sprake* v. *Day* [32] it was held that the devisee could insist that the administrator pay for finishing the house. If the builder were unwilling to finish it, this should not affect the substantial rights of the devisee; he should be entitled to have the sum paid

[31] L. R. 3 Eq. 98 (1866).

[32] [1898] 2 Ch. 510. These seem to be the only modern English cases and there seem to be no American cases.

to any other builder [33] whom he chooses, to finish it. And while in *Sprake* v. *Day* the work had already been begun by the builder, it would seem that that fact should be held immaterial.

That the real explanation is the one suggested and not the explanation of the court in *Cooper* v. *Jarman* is shown by the other part of *Sprake* v. *Day*. The testator had also contracted with the same builder to build some houses on other land already belonging to the devisee; it was held that the devisee, being a volunteer, was not entitled to have the contract carried out by the administrator. Since the devisee did not obtain from the will any property right to this land or to these houses, and since in England a sole beneficiary of a contract has no right, either at law or in equity, to complain of its non-performance, the decision seems the only logical one. But it is to be observed that the administrator may be compelled by the builder to pay damages for breach unless the beneficiary is willing to assume the burdens of the contract by paying for the houses.

If the modern decisions denying specific performance should be construed as having destroyed the property right which had come into existence because of the earlier decisions, or if equity had never given specific performance to the ancestor, there would, of course, be no equitable property right to descend to the heir; but since the contract is to erect a house on land which is now his, there would seem to be no objection to allowing him to insist upon the benefit of this contract. But if he should decline to assume its burdens and the builder wishes to go on, there seems to be no way of rescuing the executor from his embarrassing position. Such an *impassé* is of course a strong argument for abolishing the distinction between the devolution of real and of personal property.

IV. Devolution of Option Holder's Rights

Where the holder of a specifically enforcible option to buy land dies before exercising his option and also before the period for exercising the option has elapsed, does the right to exercise it go to his heir or to his executor?

There are two plausible [34] solutions: (1) Let the heir exercise the

[33] Or to himself, if he prefers to have the money rather than the building, according to what is usually called the doctrine of equitable reconversion.

[34] There are two other possible solutions, neither of which can be called plausible. If the heir were allowed to exercise the option and compel the executor to pay the

option and, if he accepts, let him get the land upon his paying the purchase price. (2) Let the executor exercise the option and, if he accepts, let him get the land upon his paying the purchase price. Since the option holder at the time of his death had just as much *right* [35] to get the land as if he had already exercised the option by acceptance, it would seem that the right should pass to the heir. If it is worth accepting, it is in substance a right to get land at a desirable price; and such a right seems to savor just as much of realty as if the option holder had accepted the option before his death.[36]

There seem to be very few decisions on the subject. In *Guston* v. *Union School District* [37] and *In re Adams* [38] the option holder was also the lessee of the land; it was held in each case that the option passed to the executor and not to the heir, but the reasoning is far from conclusive. In the first case the court seems to rely partly on the fact that the option accompanied a lease [39] which of course went to the executor, and partly on the argument that the option gave no interest in the land to the option holder. The only case cited for the latter proposition is *Richardson* v. *Hardwick*,[40] which merely held that after the time for the exercise of the option had expired without acceptance, the option holder had no right. In *In re Adams*, each of the judges was careful to rest his decision

purchase-price, such a holding would be open to two objections: (1) he would practically always exercise the option by acceptance and hence it would really cease to be an option; (2) the decedent never having become liable for the purchase money, it would be difficult to see how the executor could be made liable. If the executor were allowed to exercise the option and required in case of accepting to pay the money, but the heir to get the land, such a holding would be open to the objection that the executor would practically never exercise it by acceptance and it would therefore cease to be an option.

[35] Though, of course, under no *obligation* with respect thereto. To be sure, if the option holder accepts, his right to get the land is likely to be of longer duration than is the right given by the option, but the right itself is no greater.

[36] If the heir does not wish to accept the option but the executor does and the heir will not assign the option to him, it is arguable that the executor should be allowed in such a case to have it; but it is difficult to see any principle upon which such a tandem succession could be worked out.

[37] 94 Mich. 502 (1883).

[38] 27 Ch. Div. 394 (1883).

[39] It is difficult to see how this fact is at all significant; if the lessee had before his death exercised the option by acceptance no one would seriously contend that in such a case the equitable right to get the fee would go to the executor; and as before suggested, the acceptance of the option does not increase the option holder's right but merely makes him liable. The mere fact that the option is provided for in the lease does not make the option in any way incidental to the lease. It merely provides consideration for the option.

[40] 106 U. S. 252 (1882).

upon the peculiar words of the contract which provided for acceptance by the lessee, "his executors, administrators and assigns." While the court is probably right in assuming that the parties may effectually stipulate by their contract that in case of the death of the option holder the option shall be exercised by his executor and not by his heir; yet considering the formal character of the phrase, "executors, administrators, and assigns," it seems to be a very narrow basis for a decision. In *Newton* v. *Newton* [41] the court said that the administrator could not exercise the option except for the heir.

Where a vendor fails to make a good title to all the land which he contracted to sell, the buyer is frequently held to have an option to take specific performance with compensation for defects.[42] Such an option should devolve in the same way as express options. It is well settled that in such a case the executor cannot be compelled to pay the purchase money.[43]

While specifically enforcible options to sell are rare, they are not unknown. If the option holder should die before having exercised the option by acceptance, it should pass with the land to his heir or devisee.[44]

V. The Purchaser's Property Right and the Risk of Loss

Juridical rights [45] are deductions from juridical remedies; hence, as soon as it became the settled rule that a purchaser of land could get the remedy of specific performance, the inference or deduction was that there was already a specifically enforcible right to the property and that such right was the basis of his suit.[46] When does this equitable property right come into existence? At first glance it seems plausible that it should be regarded as

[41] 11 R. I. 390, 393 (1826).

[42] The same reasoning ought to apply to any other fact which makes a contract specifically enforcible by the purchaser but not against him.

[43] Green *v.* Smith, 1 Atk. 572 (1738); Broome *v.* Monck, 10 Ves. 597, 612 (1805).

[44] Watts *v.* Kellar, 56 Fed. 1 (1893).

[45] *I. e.*, legal and equitable.

[46] Before a remedy is once given in any particular class of cases there may be an *interest* which should be protected, but no *right* can be said to arise until such protection is given. After the remedy is once given we infer the existence of a right before the suit was brought; and if the decision is acquiesced in as representing the probable future action of the courts in such cases, the right in similar cases is then thought of as existing before any remedy is sought to enforce it and even though no remedy is ever sought. Where a right is given by a statute the inference above indicated is unnecessary.

coming into existence at the time of performance, because it is not till then that the purchaser can properly ask for a conveyance; *i. e.*, since rights depend upon remedies for the beginning of their existence, the right should not be regarded as coming into existence until the purchaser can get the remedy of specific performance.

This view was strongly urged by Professor Langdell [47] in discussing the equity rule as to risk of loss:

"What is the rule in equity in such a case? Clearly it ought to be the same as at law, if the loss happen before the time fixed for completing the purchase has arrived; for in that case the consequences of the loss will be the same in equity as at law, namely, that the vendor will be unable to perform the contract on his part. It is true that equity may enforce the contract against the vendee, notwithstanding the destruction of the buildings; but if it does, it must do so because the breach of condition by the vendor did not go to the essence of the contract, and hence the performance by the vendee must be with compensation for the loss of the buildings, *i. e.*, the value of the buildings must be deducted from the purchase-money to be paid by the vendee. If, on the other hand, the fire happen after the time fixed for completing the purchase is past, the loss will in equity fall upon the vendee; *i. e.*, the vendor will be able to throw the loss upon the vendee by enforcing specific performance of the contract in equity, assuming, of course, that he is in a condition to enforce such performance. *The reason of this is that, when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened.*" [48]

It seems to be settled, however, that equity regards the purchaser as having a property right from the moment of making a contract which he is entitled to enforce specifically, without regard to the time for performance. There are two reasons for this rule: (1) If no time is set for performance, a purchaser is entitled to ask for a conveyance after a reasonable time has elapsed. It would be highly inconvenient to have the time of coming into existence of important property rights subject to such an uncertainty. In the field of property law generally, it is of great importance that the rules be certain. Since it is fairly easy to determine the date of the completion of a contract, the advantage of having the

[47] "A Brief Survey of Equity Jurisdiction," 1 HARV. L. REV. 355, 374.

[48] The italics are the present writer's.

equitable property right date from this time is obvious. (2) If a time is set for performance, and the vendor keeps the property until that time, it might not be objectionable to regard the purchaser as having only a common-law contract right before that time, and to regard the equitable property right as coming into existence at that time if the vendor fails to convey the legal title. But to hold that the purchaser has only a common-law contract right till the time for performance, would make it possible for the vendor to prevent the purchaser from ever getting any property right by merely conveying away the land before the time came. In order, therefore, to give the purchaser adequate protection the equity courts were forced — consciously or unconsciously — to regard the purchaser as having a property right from the moment of contract.[49]

Part of the development of constructive obligation seems to have been brought about by the same practical necessity. When equity courts first gave a remedy to the *cestui que trust* against his trustee they created in the *cestui que trust* an equitable property right. Even though it was enforcible against only one person, it can hardly be regarded otherwise than as a property right. But a property right which is enforcible against only one person is of relatively little value because it can be so easily destroyed; therefore the courts were forced, in order to give adequate protection to the *cestui que trust*, to give a remedy against all transferees except *bonâ fide* purchasers for value without notice. A similar development took place in the rules relating to vendor[50] and

[49] There seems to be no hint of this in the early decisions. If the courts attempt to give any reason it is usually the maxim that equity regards that as done which ought to be done; a more complete and accurate statement of the maxim is that equity regards that as done which was agreed or directed to be done. If this were followed literally it would result in Professor Langdell's view because the conveyance was not "agreed to be done" till the time for performance. Sometimes the courts refer to the doctrine of equitable conversion as a reason for the rule, but this is not a reason for anything but merely the name for the result of the granting of specific performance by equity. The nearest analogy to the purchaser's property right is the shifting use or executory devise. For example, a devise to X in fee but if Y pays X $1000 then over to Y in fee. Y has a property right which he may protect before the contingency happens. In a somewhat similar way the purchaser has an equitable property right from the moment of contract for which he may demand protection, and he may require the transfer of the legal title upon his paying the purchase price and thereby cut off the vendor's fee. The devolution of the rents and profits after the vendor's death and before performance fits in with this analogy because they go to the heir and not to the executor.

[50] It is usually said that a transferee from a vendor may be declared a constructive

purchaser, and also in the rules relating to other equitable rights.[51] When it is said that constructive obligations are imposed upon the transferees of a trustee or vendor because it would otherwise result in unjust enrichment, the reasoning is incomplete. It *is* unjust enrichment only because the *cestui* or purchaser has an equitable property right which is enforcible against such transferees; and it is enforcible against such transferees for the reason that otherwise the equitable property right of the *cestui* or purchaser would be of too little value.

Professor Langdell seemed to assume in the argument already quoted that the risk of accidental loss necessarily followed the equitable property right of the purchaser; that is, that the moment his equitable property right came into existence, the risk of loss was necessarily thrown upon him. That this is a misconception is shown by the fact that if in a particular case the purchaser can enforce specific performance, but the vendor cannot, the risk is not on the purchaser though he has an equitable property right; and if only the vendor can enforce specific performance and the purchaser consequently has no property right, the risk is nevertheless on the purchaser in the sense that the vendor may compel him to pay the full purchase price. In other words, the risk of loss is a result of the vendor's right to get specific performance and is not a necessary incident of the purchaser's property right.

In determining when, if at all, the vendor should first be able to throw the loss upon the purchaser in the manner above indicated, the most important consideration should have been the adequate protection of the vendor. The prevailing view [52] as to risk of loss is that it passes at the moment a contract is made which is specifically enforcible *by* the vendor. Is this reasonably essential to his

trustee for the purchaser. But since it is not accurate to call an unpaid vendor a trustee it is also inaccurate to call his transferee a constructive trustee. If the claim to the purchase money has been expressly or impliedly transferred to him along with the legal title to the property, he succeeds to the rights and obligations of his transferor, and it would be much more accurate to call his constructive obligation the obligation of a constructive vendor.

[51] In the subject of equitable servitudes this development has taken place within the last century. Before Tulk *v.* Moxhay, 2 Phillips, 774 (1848), was decided, a plaintiff was able to enforce specifically a restriction on the use of land against his covenantor; but it was not till the court in that case decided that the plaintiff might also get an injunction against the transferees of the covenantor that this right to control the property of another assumed its present importance.

[52] Paine *v.* Meller 6 Ves. 349 (1801).

protection? Since he usually continues his fire [53] insurance after making the contract to sell, it is seldom that he really needs the protection of the prevailing rule. And when we consider that purchasers are not likely to insure before title passes, the rule is also open to the objection of working a hardship on the purchaser in many cases. This hardship could have been lessened and the vendor given reasonably adequate protection, if the courts had held the risk to pass at the time the vendor puts the purchaser in default, by a proper offer of performance. That such a rule would be workable is indicated by the fact that in determining some other questions this point of time has been made the criterion.[54] And since the general understanding of laymen is that the risk does not pass till title is transferred it would have eliminated the hardship on the purchaser and still given the vendor reasonably adequate protection if the equitable rule had been settled in harmony with such understanding.

To have the risk pass to the purchaser at the time of performance, as advocated by Professor Langdell, is open to the objection that if no time is set for performance, it would be quite inconvenient to have the risk determined by such an uncertain test as the lapse of a reasonable time. Hence, even though the prevailing rule is unnecessary for the adequate protection of the vendor, it is to be preferred to Professor Langdell's view because the time of the completion of the contract is usually easy to ascertain.[55]

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[53] Most of the cases of accidental loss are those caused by fire. Where the cause of the loss is one which is not usually insured against and the vendor has not in fact insured, the above argument does not apply. In such cases, where the ultimate loss must fall upon either the vendor or the purchaser and can not be shifted to an insurance company, it makes very little difference which rule as to risk of loss is applied provided that it gives a certain workable test.

[54] In Carrodus *v.* Sharp, 20 Beav., 56 (1855), the subject-matter of sale was the lease of a mill which bound the lessee to keep in repair; it was held that the burden of complying with the covenant to repair did not pass till the vendor had made out a good title. And in the converse case of Liggett *v.* Metropolitan Ry. Co., L. R. 5 Ch. App. 716 (1870), the court held that although ordinarily the purchaser was entitled to the rents and profits from the time set for performance, yet if he defaulted in the payment of the purchase money he was not so entitled.

[55] The rule of Paine *v.* Meller is rendered less surprising when we consider the strong inclination of courts to assimilate the rules applying to the vendor to those applying to the purchaser. See *ante*, 52.